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No. 98-1036

IN THE

Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

SAM WARDLOW, A.K.A. WILLIAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does unprovoked flight from a uniformed police officer justify a stop under *Terry* v. *Ohio*?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The investigative stop and frisk is a mainstay of modern policing. It allows the police to react quickly to suspicious behavior, often preventing crimes before they are committed. *Terry* v. *Ohio*, 392 U. S. 1 (1968) recognizes the importance of

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

this technique by subjecting stops to the deferential reasonable suspicion standard. The decision of the Illinois Supreme Court that flight from uniformed police does not justify a *Terry* stop is contrary to this Court's deference to police on the street. The Illinois decision, if upheld, will cloud the *Terry* standard and straitjacket police confronted with clearly suspicious conduct. This is contrary to the interests of justice and society that CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On September 9, 1995, Officer Timothy Nolan and his partner were part of a "caravan" of Chicago police cars investigating narcotics sales around West Van Buren Street. *People* v. *Wardlow*, 701 N. E. 2d 484, 485 (Ill. 1998). The caravan consisted of eight officers in four cars, with Nolan's car in he rear. *Ibid.* At the suppression hearing, Nolan testified that he wore his uniform that day, but he could not recall whether his car was marked. *Ibid.*

Nolan, the driver, observed defendant in front of 4035 West Van Buren. *Ibid.* Defendant "looked in the officers' direction and then fled." Nolan drove south toward Congress Avenue, observing defendant, who had fled south through a gangway and an alley. Defendant was carrying a white opaque bag under his arm. He was cornered near 4036 West Congress when he ran right towards Officer Nolan's car. *Ibid.*

Officer Nolan stopped defendant and immediately conducted a pat-down search. Since he could not see what was inside the bag, Officer Nolan squeezed it "and felt a very heavy, hard object 'that had a similar shape to a revolver or a gun.' " *Ibid.* Believing this to be a weapon, Officer Nolan opened the bag, finding a .38 caliber pistol containing five live rounds. Nolan then arrested defendant. *Ibid.* Although there is no direct evidence of the exact time of the encounter, the arrest report was filed at 12:15 p.m. See *id.*, at 485, n. 1.

Defendant was convicted of unlawful use of a weapon by a felon. *Id.*, at 484. The Illinois Court of Appeal reversed the conviction, finding the handgun was the fruit of an improper stop. *Ibid.* The Illinois Supreme Court affirmed, holding that defendant's flight did not justify a stop under *Terry* v. *Ohio*, 392 U. S. 1 (1968). *Wardlow*, 701 N. E. 2d, at 487, 489.

SUMMARY OF ARGUMENT

The present case turns on an appropriate understanding of *Terry* v. *Ohio*, 392 U. S. 1 (1968). *Terry* is a pragmatic decision that helps fit Fourth Amendment principles to modern times. It balances an acute awareness of the investigative needs of police and society with the legitimate need to be free from police harassment.

Although this Court has never determined whether flight from the police justifies a *Terry* stop, its interpretation of *Terry* shows a pattern of deference to limited police intrusions so long as some level of objective suspicion exists. *Terry* and its progeny do not affix some mathematically precise level of suspicion for a proper stop. Instead, reasonable suspicion requires no more than a minimal, objective suspicion of criminality. That suspicion can be supported by evidence that has both innocent and suspicious explanations. So long as the level of suspicion is beyond a "mere curiosity, rumor, or hunch," *Terry* is satisfied.

Unprovoked flight from a police officer justifies a *Terry* stop. Flight supports reasonable suspicion because of the close relationship between flight from authority and a guilty mind. This Court has found flight as evidence of a guilty mind in a variety of contexts, finding it to strongly support probable cause, and admissible at trial as evidence supporting an inference of guilt. This position finds support from a wide variety of other sources, including respected judges and legal commentators. Fleeing from a visible police presence thus raises the type of question which *Terry* allows officers to investigate.

The right to avoid contact with the police does not negate reasonable suspicion. The fact that flight has innocent, as well as suspicious, explanations does not alleviate the reasonable suspicion; *Terry* can be satisfied by ambiguously suspicious conduct. There are many innocent ways to avoid contact with the police. By fleeing, defendant indicated to police officers that he had a guilty mind, which is worthy of investigation. Had he simply walked away or refused to talk to the officers, there would have been no grounds for a *Terry* stop.

Unprovoked flight from police not only justifies the stop in the present case, but also supports a *Terry* stop in any circumstance. Flight from police is suspicious without regard to time or place. As flight is suspicious under virtually any conceivable context, flight alone should support reasonable suspicion.

Although this Court usually avoids promulgating bright-line rules in Fourth Amendment cases, it will do so under the appropriate circumstances. The relationship between flight from police and *Terry* is this type of situation. Because flight will justify a *Terry* stop under almost any set of facts, little will be lost and much will be gained by a rule recognizing flight's importance in all situations.

ARGUMENT

The investigative stop and frisk sanctioned by *Terry* v. *Ohio*, 392 U. S. 1 (1968) embodies the reasonableness that forms the core of the Fourth Amendment. Police should not have to wait for probable cause before every intrusion into privacy. Some street encounters warrant some intrusion short of arrest and search. By allowing officers to investigate merely suspicious behavior, as opposed to the more clearly illicit behavior needed to support probable cause, *Terry* stops can prevent crimes before they are completed. This was the case in *Terry*, which involved several armed individuals casing a store window for what might have been an armed robbery. See *id.*, at 5-6. *Terry* accomplishes this while still protecting privacy

through its reasonable suspicion standard and the limited intrusion it sanctions. As one of our most prominent state court judges noted, anticipating *Terry*, the stop and frisk is a worthy compromise between public safety and individual rights.

> "It might be possible . . . to lessen the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there were circumstances sufficient to warrant it, even though not tantamount to probable cause for arrest. Such a minor interference with personal liberty would touch the right to privacy only to serve it well." Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 333-334.

As a proper analysis of the *Terry* standard and its relationship to flight from uniformed police will show, the Illinois Supreme Court upset *Terry*'s compromise by suppressing the evidence in this case.

I. The reasonable suspicion standard is primarily intended to prevent harassing stops based upon no more than curiosity, rumor, or hunch.

In deciding whether flight from a visible police presence justifies a stop under *Terry* v. *Ohio*, 392 U. S. 1 (1968), this case must be grounded in a thorough understanding of *Terry*'s reasonable suspicion standard. Unfortunately, this term is an "elusive concept" that by itself does not guide courts, counsel, or officers through the "myriad factual situations" found in street encounters between officers and citizens. See *United States* v. *Cortez*, 449 U. S. 411, 417 (1981). A careful reading of *Terry* and its progeny reveals an underlying policy of accommodating society's critical interest in investigation while limiting police harassment. Proper analysis of any set of facts under the reasonable suspicion requirement will adhere to these principles.

A. The Terry Standard.

When this Court applied the exclusionary rule to the states in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the power of the exclusionary rule was dramatically increased, influencing virtually every criminal prosecution in this country. Expanding the exclusionary rule put this Court's Fourth Amendment jurisprudence under increasing strain. An amendment that arose from the abuses of English customs officials, see 1 W. LaFave, Search and Seizure § 1.1(a), p. 4 (3d ed. 1996), now had to deal with the core functions of modern American police work. These difficulties were compounded by the text of the Fourth Amendment,[2] which "has 'both the virtue of brevity and the vice of ambiguity,' " *id.*, at 5, making it difficult to interpret. The many problems of dealing with the Fourth Amendment in modern society eventually found their way to this Court.

Terry is a pragmatic decision that helped fit Fourth Amendment jurisprudence to modern times. *Terry* involved one of the most common and important parts of police work, a "confrontation on the street between the citizen and the policeman investigating suspicious circumstances." 392 U. S., at 4. Cleveland Police Detective Martin McFadden, a veteran of 39 years of police work, observed Terry and two other people engaging in what appeared to McFadden to be " 'casing a job, a stick-up.' " *Id.*, at 6. Believing this was a time for action, Officer McFadden approached the men, identified himself as a police officer, and asked them for their names. After receiving an inaudible response, Officer McFadden grabbed Terry, spun him around, and patted him down. He eventually found a pistol on Terry's person. *Id.*, at 6-7.

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2. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. Amdt. 4.

This Court found that Officer McFadden's investigation did not violate the Fourth Amendment. While defendant had Fourth Amendment interests in his stop and search, *id.*, at 9, the *Terry* Court understood that police had a great stake in protecting the legality of the "stop and frisk." *Id.*, at 10. The interests of the public in successful law enforcement, when combined with the relatively less intrusive nature of a stop and frisk, convinced the *Terry* Court to accept the legitimacy of the stop and frisk.

The proponents of the stop and frisk "argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." *Id.*, at 10. According to its proponents, there is a difference between a "stop" and a "seizure" and a "frisk" and a "search." These differences would allow an officer to make the less intrusive stop and frisk with less than probable cause. See *ibid.* The opponents of the stop and frisk would apply one standard to all police activities. "The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution." *Id.*, at 11. They urged that approval of the stop and frisk "would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers . . . . " *Id.*, at 12.

The *Terry* Court approached this case "mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." *Ibid.* It also recognized that the thrust of the exclusionary rule is deterring unlawful conduct by the police. *Ibid.* Because there would be times when the exclusion of evidence would not deter police conduct, courts had to be sensitive to when their sanctions against the police would be futile. See *id.*, at 14. Given the great diversity of street

encounters between police and citizens, see *id.*, at 13, "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Id.*, at 15.

The practical bent of the *Terry* Court extended to its analysis of the particular facts in the case. It recognized that it would be impractical to hold the stop and frisk to the requirements of the Warrant Clause, as it involved "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.*, at 20. Instead, the Court simply looked to the reasonableness of Officer McFadden's actions. Using the test found in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), it balanced the need for the stop and frisk against the invasion of privacy entailed by these acts. *Terry*, *supra*, 392 U. S., at 21.

The assessment of the government interests shows the central theme of this opinion. The most important justification for Officer McFadden's decision to approach defendant and his companions was that this decision was part of the core of police work—"effective crime prevention and detection." *Id.*, at 22. If Officer McFadden was to do his job properly, he had to be allowed to stop and investigate individuals acting in a manner such as Terry. "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." *Id.*, at 23. The need to let police do their jobs is also reflected in the *Terry* Court's recognition of the police officer's need to make sudden decisions. See *id.*, at 20. *Terry* recognizes that the exclusionary rule "cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." *Id.*, at 13. Finally, the *Terry* Court justified the frisk of defendant for practical reasons. The Court recognized that police work can be dangerous, and there are

many times when an officer must be allowed to pat down a suspect so that he may do his job safely. See *id.*, at 23-24.

The *Terry* Court did not leave police officers with unfettered discretion. To justify "the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.*, at 21. The Court sought to prevent officers from using the stop and frisk as a license to harass or otherwise annoy "outside the legitimate investigative sphere." *Id.*, at 15. While the exclusionary rule could not prevent "[t]he wholesale harassment by certain elements of the police community of certain minority groups," *id.*, at 14, *Terry* did not give officers license to harass. "Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Id.*, at 15. So long as an officer has some "specific and articulable facts" supporting the stop, see *id.*, at 21, the threat of harassment is sufficiently abated to satisfy the Fourth Amendment.

Given the balance of government and citizen interests, these facts and inferences did not have to constitute probable cause, but only had to "reasonably warrant that intrusion." *Ibid.* This is not an evidentiary Everest. "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than *inarticulate hunches* . . . ." *Id.*, at 22 (emphasis added). Thus a balance is struck between two absolutes. The *Terry* Court avoids treating street encounters like searches of dwellings. To do so would stifle police activity on the streets through the overly formal warrant procedure. See *id.*, at 20. "Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Ibid.* At the same time, the decision does not give police unfettered discretion to stop people on the streets. By requiring the officer to have specific justification for the stop and frisk, the *Terry* Court brings these encounters into the mainstream of Fourth Amendment law, see

id., at 21, n. 18, while recognizing the many practical difficulties encountered by police operating on the streets.

B. Terry's Progeny.

While this Court has never determined whether flight from police by itself justifies a *Terry* stop, its interpretations of *Terry* show a pattern of deference to limited police intrusions so long as some objective ground for suspicion exists. If the justification given for the intrusion acts to limit police discretion, this Court has deferred to the needs of police to respond to imminent criminal activity without the fear of judicial second-guessing.

1. Supporting the officer.

Since *Terry*, this Court has steadily supported the authority of police officers to conduct various stops and frisks without the threat of undue judicial interference. One notable example is found in *United States* v. *Cortez*, 449 U. S. 411 (1981). *Cortez* involved an investigative stop of a vehicle made after Border Patrol officers deduced, by observing various footprints at a border crossing, that groups of illegal aliens were being led across the border on foot and then transported further via vehicle. The officers used this deduction and their knowledge that certain types of vehicles are used to carry illegal aliens to stop defendant's vehicle. After conducting an immigration check, agents found six illegal aliens hiding in defendant's camper. *Id.*, at 413-416.

The *Cortez* Court recognized that under *Terry* and other cases, this investigatory stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.*, at 417. There were two criteria for making this decision. "First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Id.*, at

418. These data then allow officers to make inferences or deductions that an average person might be incapable of reaching. *Ibid.* "The second element . . . is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Ibid.*

The two requirements do not straitjacket the police. Behind the *Cortez* decision was the realization that this "process does not deal with hard certainties, but with probabilities." *Ibid.* The officers' privilege to draw conclusions from a certain set of circumstances simply reflects what had long been common practice. "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same — and so are law enforcement officers." *Ibid.* Thus, the evidence collected and conclusions drawn "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Ibid.*

When viewed from this perspective, the action of the Border Patrol became readily acceptable. The *Cortez* Court reviewed each of the Border Patrol's observations and deductions and found the whole logical chain flawless. *Id.*, at 419-421. "We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement." *Id.*, at 419.

The need for police to be able to do their jobs is recognized in other post-*Terry* cases. In *Adams* v. *Williams*, 407 U. S. 143 (1972), Police Sergeant John Connally was driving alone on patrol duty when a person known to the sergeant approached the car and told him that a person seated in a nearby car was carrying narcotics and had a gun at his waist. *Id.*, at 144-145. After calling for assistance, Sergeant Connally approached the vehicle and asked the occupant to leave the car. When the occupant rolled down the window, Sergeant Connally reached into the car to where he thought a gun would be, and took a loaded revolver from defendant's waistband. *Id.*, at 145. In

upholding this stop and frisk, the *Adams* Court emphasized the need to allow police to do their jobs.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry recognizes that it may be the essence of good police work to adopt an intermediate response.*" *Ibid.* (emphasis added).

Part of an officer's job is ensuring his own safety while conducting his duties. Thus, an officer making a *Terry* stop "should not be denied the opportunity to protect himself from attack by a hostile suspect." *Id.*, at 146. Therefore, as Sergeant Connally properly responded to an informant's tip that the suspect was armed, he could search defendant for the weapon he suspected defendant of possessing. *Id.*, at 147-148.

Terry's basis in common sense has allowed this Court to apply it to situations beyond those which first brought about the ruling. *Terry* initially dealt with street encounters where a police officer believed a crime was about to take place. *Terry*, *supra*, 392 U. S., at 30. Since then, *Terry* has been applied to Border Patrol checkpoints, *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 566-567 (1976), automobile stops, *Cortez*, *supra*, 449 U. S., at 417, and "sniff tests" of airport luggage. *United States* v. *Place*, 462 U. S. 696, 702 (1983). *Terry* has been expanded to include investigation of crimes that have already been completed. *United States* v. *Hensley*, 469 U. S. 221, 229 (1985). The post-*Terry* decisions have also recognized that *Terry* is not just a method for allowing a law enforcement officer to protect himself. A general interest in law enforcement can be enough to justify a *Terry* stop. See *Place*, 462 U. S., at 703-704. The many different uses of *Terry* reiterates the practical essence of this decision.

2. Appropriate limits.

Terry does not, however, present police officials with a blank check. An officer can only stop a person after developing an articulable suspicion supported by facts that the person may be involved in some suspicious activity. See *Terry*, *supra*, 392 U. S., at 21. This is intended to prevent an officer from making *Terry* stops with unfettered discretion.

Time and again the cases in which this Court has invalidated *Terry* stops turned on whether an officer's justification for the stop sufficiently limited his discretion. Thus, in *Brown* v. *Texas*, 443 U. S. 47 (1979), this Court castigated the police for making a stop for the sole reason that the suspect looked suspicious. *Id.*, at 52. The primary reason behind the reversal was to limit the discretion of police officers. "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions *solely at the unfettered discretion of the officers in the field.*" *Id.*, at 51 (emphasis added).

Another example of conduct exceeding the limits of *Terry* is found in *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975). Here, Border Patrol agents operating a roving patrol for illegal immigrants stopped a car near the Mexican border with no justification except that the vehicle's occupants appeared to be of Mexican descent. *Id.*, at 875. The Court rejected this as the sole justification for a *Terry* stop, as it placed too much discretion in the hands of Border Patrol officials.

> "In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. . . . To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, *solely*

at the discretion of Border Patrol officers." *Id.*, at 882 (emphasis added).

Although it is clear that *Terry*'s reasonable suspicion standard is intended to prevent the harassment associated with unfettered discretion, the exact limit the standard places on police is less clear. It is not a " 'finely-tuned standard[],' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996) (quoting *Illinois* v. *Gates*, 462 U. S. 213, 235 (1983)). Reasonable suspicion and probable cause are instead "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Ibid.*

3. Innocence and suspicion.

This Court has established some guidelines broader than the particular facts of the case. The information supporting reasonable suspicion need not solely point to the suspect's criminality; evidence that has both illicit and innocent explanations may support reasonable suspicion. *United States* v. *Sokolow*, 490 U. S. 1, 8-10 (1989) (paying for expensive airline tickets with cash, combined with other factors).

The type of proof demanded by the reasonable suspicion standard allows it to be supported by such ambiguous evidence. Instead of some quantum of proof such as the reasonable doubt or preponderance standards, the reasonable suspicion standard "requires some '*minimal* level of objective justification' for making the stop." *Id.*, at 7 (emphasis added) (quoting *INS* v. *Delgado*, 466 U. S. 210, 217 (1984)). "That level of suspicion that is considerably less than proof of wrongdoing by a preponderance of the evidence." *Ibid.*

Rather than the level of proof, reasonable suspicion is concerned with finding some specific objective fact or facts supporting an inference of criminality. Objectivity is the hallmark of the Fourth Amendment, a fact noted by the *Terry* Court. See *Terry*, *supra*, 392 U. S., at 21, n. 18. By being

objective and centered on the detainee's potential criminality, reasonable suspicion helps to prevent the harassment that was the central concern of the *Terry* Court, while its "minimal" level of suspicion allows police to investigate suspicious activity without fear of undue judicial interference.

In re Tony C., 21 Cal. 3d 888, 582 P. 2d 957 (1978) demonstrates this point. The California Supreme Court first provides an excellent summary of what *Terry* requires:

> "[T]he courts have concluded that in order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question." *Id.*, at 893, 582 P. 2d, at 959 (citation and footnote omitted).

This decision then gives further substance to reasonable suspicion when it rejects the notion that only unambiguously suspicious behavior supports a *Terry* stop. "Indeed, the principal function of [the officer's] investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal . . . ." *Id.*, at 894, 585 P. 2d, at 960. This reinforces *Terry*'s role as an investigative tool. A decision so closely tied to the core of police work requires a deferential standard. That standard is defined by what *Terry* seeks to prevent.

> "The citizen's undoubted interest in freedom from abuse of this procedure is protected—so far as it is within the law's power to do so—by the correlative rule that no stop or detention is permissible when the circumstances are not

reasonably 'consistent with criminal activity' and the investigation is therefore based on mere curiosity, rumor, or hunch." *Ibid.*

Therefore, reasonable suspicion is satisfied by no more evidence than that necessary to raise the officer's suspicion beyond "mere curiosity, rumor, or hunch." What matters is not the level of suspicion, but the existence of some articulable fact and an objectively reasonable, but minimal, inference of possible criminality. So long as there is some suspicion beyond the level of a hunch or rumor then the threat of harassment is averted, and *Terry* is satisfied.

Terry was decided with the recognition that the police encounter many difficult situations when working in the field. The needs of the police and the rights of individuals are balanced by allowing relatively unintrusive stops and frisks so long as some legitimate law enforcement goal justifies the intrusion. The only requirement is that the officer have some reasonable suspicion that the suspect is engaged in some suspicious activity. *Terry* is a practical case and it should be used in a practical manner. So long as the officer's discretion is sufficiently limited and the purpose of his actions are properly related to legitimate law enforcement goals, courts should not second-guess decisions made by officers in the field.

II. Unprovoked flight from a police officer justifies a *Terry* stop.

This case represents a common problem. An individual spots a police officer and flees. The officer must decide whether to pursue and find out the reason behind the flight, or allow the individual to escape. Before examining flight's justification for a *Terry* stop, it is important to understand what is not present in this case. Defendant did not flee from an undercover officer. Although it is uncertain whether Officer Nolan's car was marked, he was in uniform, and defendant fled after looking in his direction. *People* v. *Wardlow*, 701 N. E. 2d

484, 485 (Ill. 1998). Since the arrest report was filed at 12:15 p.m. it is reasonable to conclude that this encounter took place during daylight, reinforcing the conclusion that defendant's flight was caused by the presence of the police.

It is equally important to remember that defendant's decision to flee was his own. If an officer tries to scare someone into fleeing, the flight is no longer suspicious, and the attempt to provoke the flight is unconstitutional. See Hobson, *Flight and Terry: Providing the Necessary Bright Line*, 3 Md. J. Contemp. Legal Issues 119, 150 (1992).

Defendant's unprovoked flight from a known police officer provided reasonable suspicion for his *Terry* stop. As this type of flight is inherently suspicious regardless of other factual contexts, it should always satisfy *Terry*'s reasonable suspicion standard.

A. Flight and Suspicion.

Flight from a police officer justifies a *Terry* stop because of the close relationship between flight from authority and a guilty mind. In *California* v. *Hodari D.*, 499 U. S. 621, 623 (1991), this Court confronted a *Terry* stop involving flight. Because the argument that the stop was justified had not been preserved in the court below, the *Hodari* Court did not reach this issue. See *id.*, at 623, n. 1. Even so, the *Hodari* Court understood flight's potential relevance to a *Terry* stop. "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ('The wicked flee when no man pursueth')." *Ibid.*

This Court has long recognized that flight is evidence of a guilty mind. In *Sibron* v. *New York*, 392 U. S. 40 (1968), an off-duty police officer surprised two men who were acting furtively in his apartment building's hallway. *Id.*, at 48. Upon seeing him, they fled, and he pursued. He caught, arrested, and searched one of the suspects. *Id.*, at 48-49.

The search was upheld as incident to a lawful arrest. *Id.*, at 66. Defendant's flight was a major factor in the probable cause determination. *Id.*, at 66-67. While the *Sibron* Court relied on several factors in addition to flight to justify the arrest, this does not mean that flight alone cannot justify a *Terry* stop. The *Sibron* Court used these factors to find probable cause to make an arrest. *Ibid.* A *Terry* stop is less intrusive than an arrest, however, and thus requires a smaller quantum of evidence than probable cause. See *Terry* v. *Ohio*, 392 U. S. 1, 26 (1968). Given the different requirements for an arrest and *Terry* stop, it would not be inconsistent with *Sibron* to allow flight to justify a *Terry* stop. In *Sibron*, flight was one of the several factors that combined to give overwhelming probable cause to arrest. It was clearly among the most important factors, being one of the two "strong indicia of mens rea" cited by the *Sibron* Court, see 392 U. S., at 66, demonstrating the importance of this type of evidence.[3] *Sibron*'s use of flight is consistent with the approach of Learned Hand, who found flight strongly supportive of probable cause to arrest in *United States* v. *Heitner*, 149 F. 2d 105, 106-107 (CA2 1945). As Judge Hand noted, regardless of any criticism leveled at flight, "it has at no time been doubted that flight is a circumstance from which a court or

3. This Court's dismissal of flight as justification for probable cause in *Wong Sun* v. *United States*, 371 U. S. 471, 483-484, n. 10 (1963) must be read in light of *Hodari D.* and flight's benign treatment in *Hodari D.* and *Sibron*. As *Wong Sun* was a probable cause case, see *id.*, at 479, its rejection of flight alone is not controlling in this case.

The facts surrounding defendant's flight in *Wong Sun* further distinguish it from the present case. *Wong Sun*'s actual holding was based on the officer's failure to identify himself with the requisite clarity. The narcotics agent "affirmatively misrepresented his mission at the outset . . . . [a]nd before [the suspect] fled, the officer never adequately dispelled the misimpression engendered by his own ruse." *Id.*, at 482-483. Therefore, the flight expressed no more than "a natural desire to repel an apparently unauthorized intrusion." *Id.*, at 483. This does not govern the unprovoked flight from a uniformed officer found in the present case, see *supra*, at 16, and any general condemnation of flight in footnote 10 of *Wong Sun* is pure dictum.

officer may infer what everyone in daily life inevitably would infer." *Ibid.*

Another example of flight's probative value is the use of defendant's flight from the scene of the crime or the jurisdiction against him at trial. A court may instruct the jury that it may consider defendant's flight against him unless he provides an explanation because "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen v. United States*, 164 U. S. 492, 499 (1896). While flight from a crime scene does not create a presumption of guilt, and can have innocent explanations, see *Alberty* v. *United States*, 162 U. S. 499, 510 (1896),[4] this fact does not disqualify flight alone as a basis for reasonable suspicion. *Alberty* disapproved an instruction on flight that was "tantamount to saying to the jury that flight created a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as axiomatic truth . . . ." *Ibid.* While disapproving this presumption, *Alberty* expressly allowed the jury "to take into consideration the defendant's flight from the country as evidence bearing upon the question of his guilt . . . ." *Id.*, at 510-511. The problem was that the trial court gave flight a presumptive strength it did not warrant. "The criticism to be made upon this charge is, that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient *to create a presumption of guilt*." *Id.*, at 511 (emphasis added). *Alberty*'s treatment of flight is consistent with flight supporting reasonable suspicion. Although in *Alberty* flight could not support a

4. The presumption of guilt from flight condemned in *Alberty* was probably a holdover from a common law provision that allowed the accused's goods and chattels to be forfeited if the jury found that he had fled because "the very flight is an offense, carrying with it a strong presumption of guilt, and is at least an endeavor to elude and stifle the course of justice prescribed by the law." 4 W. Blackstone, Commentaries 380 (1st ed. 1769). The harshness of this penalty kept it from being enforced. *Ibid.* It is believed that the rule was designed to deter flight from the jurisdiction instead of being a rule of evidence. See 2 J. Wigmore, Evidence § 276, p. 122 (Chadbourne rev. 1979).

presumption of guilt, it is *evidence* of guilt. Similarly, although flight from police alone does not provide enough evidence to amount to probable cause, it will satisfy the lower standard of reasonable suspicion. *Terry* does not require proof of guilt; the inference of guilt allowed in *Alberty* and *Allen* is more than enough suspicion for *Terry*.

By simply dismissing flight as a justification for a *Terry* stop, the Illinois Supreme Court avoids the balancing approach that has been taken by this Court in *Terry* and its progeny. The Illinois high court therefore avoids recognizing the great burden that its decision places on the police officer in the field. An officer's decision to initiate a *Terry* stop "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." See *Graham* v. *Connor*, 490 U. S. 386, 396 (1989) (use of force at *Terry* stop) (citing *Terry*, *supra*, 392 U. S., at 20-22). The officers in the present case drove by a young man who fled as the officers' car approached. The officers were then presented with two choices: pursue or allow him to flee. In deciding to pursue, the officers made a logical decision consistent with police practices that served a crucial government interest.

Suspicions are naturally aroused when someone flees from your approach. The suspicion will be all the greater when the person fled from is a police officer. A primary function of the police officer is investigation. See *Miranda* v. *Arizona*, 384 U. S. 436, 477 (1966). The investigative powers of the police initiating a *Terry* stop can be aimed at past, future, or current criminal conduct. See *United States* v. *Hensley*, 469 U. S. 221, 227-228 (1985). As flight is indicative of a guilty mind, it would be bad police practice to not investigate why the youths fled. Cf. *Terry*, *supra*, 392 U. S., at 23. "A person who manifests concern for the presence of police . . . who flees at the sight of an officer will commonly be detained and questioned." L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime

32 (1967).[5] *Terry* was never intended to punish officers for good, aggressive investigation. See *United States* v. *Cortez*, 449 U. S. 411, 419 (1981).

B. Flight vs. Walking Away.

Balanced against the interest of police officers in doing good work is defendant's interest in not being pursued and stopped. A person who has done nothing to arouse suspicion towards himself has a right not to have contact with or be questioned by the police. Therefore, if defendant wanted to avoid contact with the police and the police had no articulable suspicion of criminal conduct on his part, then the police must let him go. This was the basis of the Illinois Supreme Court's decision to invalidate the *Terry* stop. See *People* v. *Wardlow*, 701 N. E. 2d 484, 486-487 (1998) (quoting *State* v. *Hicks*, 241 Neb. 357, 363-364, 488 N. W. 2d 359, 363-364 (1992)). The Illinois Supreme Court apparently saw no difference between walking away and running away.

The problem with this decision is that it fails to take into account that there are many different ways of ending an encounter with police. A simple straightforward denial of a police request will not provide the officer with cause for a *Terry* stop. Thus a simple refusal to identify oneself cannot justify a frisk. See *Brown* v. *Texas*, 443 U. S. 47, 52-53 (1979). Similarly, a person is entitled to walk away from a police officer when asked to stop and respond to questioning. See *Smith* v. *United States*, 558 A. 2d 312, 316-317 (D. C. App. 1989) (en banc) (walking at "fast pace" but not "bolting" or "running" does not justify stop; running cases distinguished). If approached and questioned, a person may decline to answer and simply walk away. *Florida* v. *Royer*, 460 U. S. 491, 497-498 (1983).

Defendant's actions, however, were not the kind normally associated with innocence. He did not simply assert his right to

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5. This publication is the primary authority on police procedure in *Terry*. See *Terry*, 392 U. S., at 13-14, nn. 9-10.

avoid contact; he ran when he saw the officers' car. *Wardlow*, *supra*, 701 N. E. 2d, at 485. This indicated to the police that respondent had a guilty mind, which is worthy of investigation. Had defendant simply walked away, see *Smith*, *supra*, or had he simply held his ground and refused to answer any questions posed to him by the officers, see *Brown*, *supra*, there would have been no grounds for a *Terry* stop.

In *People* v. *Souza*, 9 Cal. 4th 224, 234-235, 885 P. 2d 982, 988 (1994), the California Supreme Court directly addressed the notion that the right to walk away somehow negated the suspicion that would otherwise arise from flight:

> "The United States Supreme Court's observation in *Florida* v. *Royer*, *supra*, 460 U. S. 491, 498 [75 L. Ed. 2d 229, 236-237], that a person approached by police for questioning may decline to answer the questions and 'may go on his way,' does not imply that the *manner* in which a person avoids police contact cannot be considered by police officers in the field or by courts assessing reasonable cause for briefly detaining the person. There is an appreciable difference between declining to answer a police officer's questions during a street encounter and fleeing at the first sight of a uniformed police officer. Because the latter shows not only unwillingness to partake in questioning but also unwillingness to be observed and possibly identified, it is a much stronger indicator of consciousness of guilt." (Emphasis in original).

As it was defendant's own decision to flee that imparted this information to the officers, he should not be allowed to use any right to avoid contact to negate their reasonable suspicion.[6] The Illinois Supreme Court's reasoning, if upheld, makes it too difficult for an officer to find out why someone flees from his presence. "The fact of flight is of itself significant; it becomes

6. The right to tender payment in Federal Reserve Notes, see 31 U. S. C. § 5103, does not negate the suspicion of buying airline tickets with a wad of $20 bills. See *United States* v. *Sokolow*, 490 U. S. 1, 8-9 (1989).

most significant when after all no explanation is forthcoming." 2 J. Wigmore, Evidence § 276, p. 129 (Chadbourne rev. 1979). Officers should be able to find the explanation for the individual's flight. *Terry* is meant to give the officer the opportunity to determine if ambiguous behavior betrays criminal intent. See *In re Tony C.*, 21 Cal. 3d 888, 894, 582 P. 2d 957, 960 (1978).

The reasonable suspicion requirement was affixed to *Terry* to limit police discretion.[7] Basing the stop on something more than a rumor or hunch limits the opportunity to harass civilians. See *supra* at 15-16. Flight provides exactly the type of objective basis for suspicion that properly limits the discretion of the officer in the field. Flight is both self-evident and articulable. It does not conjure up some vague and subjective standard. Cf. *Brown* v. *Texas*, *supra*, 443 U. S., at 49 (suspect "looked suspicious"). Although whether the suspect fled from police officers is occasionally at issue, flight is evident in the overwhelming majority of cases. See Hobson, *supra*, 3 Md. J. Contemp. Legal Issues, at 136-137, n. 138. It does not threaten arbitrary application, such as an officer's decision to pull a motorist over because he had nothing better to do. Cf. *Delaware* v. *Prouse*, 440 U. S. 648, 650-651 (1979). Flight is not indiscriminately applicable to a large number of innocent people, and it is not a "suspect classification." Cf. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 885-886 (1975) (Mexican ancestry).

In the heat of the moment, Officers Nolan and Harvey decided to find out what defendant was up to. In so doing, the officers did their jobs well. They were able to stop defendant, and they determined that he was engaging in criminal acts without arbitrarily infringing upon any of his rights. Good police work such as this deserves commendation, not condemnation.

7. See Part I B 2, *supra*, at 13-14.

C. A Single Rule.

Unprovoked flight from known police not only justifies the stop in the present case, but also supports a *Terry* stop in any circumstance. Although this Court is wary of establishing bright-line rules in Fourth Amendment cases, see *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996), this Court will draw lines to guide officers and the courts through the Fourth Amendment when appropriate. See *Maryland* v. *Wilson*, 519 U. S. 408, 413, n. 1 (1997). Although the factual context of defendant's flight in the present case strengthens reasonable suspicion, flight from a uniformed police officer will justify a *Terry* stop in almost any conceivable circumstance. This Court should recognize such flight's widespread strength and relevance, and establish that it always justifies a *Terry* stop.

Terry stops are evaluated under the "totality of circumstances" surrounding the stop and frisk. *United States* v. *Cortez*, *supra*, 449 U. S., at 417. In the present case, this involves placing defendant's flight in the context of its time and place, during the daytime, and in a high-crime area. See *supra* at 2. Both circumstances can give relatively innocent facts the proper context to support a reasonable suspicion finding. While the frequency of crime in an area does not alone justify a detention, see *Souza*, *supra*, 9 Cal. 4th, at 240-241, 885 P. 2d, at 992, the area's reputation for crime is an appropriate factor to consider when determining whether the *Terry* stop is reasonable. *Ibid* (citing *United States* v. *Sharpe*, 470 U. S. 675, 682-683, n. 3 (1985)).

The time of day is also relevant to some *Terry* stops. Officers believe that innocent people are less likely to be out at night. See 4 W. LaFave, Search and Seizure § 9.4(f), p. 187 (3d ed. 1996); L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime 21 (1967). Courts also look to the time of day, finding that late hours and darkness make some actions more suspicious. See, *e.g.*, *Souza*, *supra*, 9 Cal. 4th, at 241, 885 P. 2d, at 992-993; *United States* v. *Lender*, 985 F. 2d 151, 154 (CA4 1993); *United States* v. *Watson*, 953 F. 2d 895, 897 (CA5

1992). Some courts have also found that some activities such as "hanging around" or loading boxes are not suspicious when conducted in daylight. See, *e.g.*, *Gibbs* v. *State*, 306 A. 2d 587, 593 (Md. App. 1973) ("hanging around"); *United States* v. *Kerr*, 817 F. 2d 1384, 1387 (CA9 1987) (loading boxes).

Unlike more innocent activities, flight from police is suspicious at any time, in any place. As noted above, nighttime is most often associated with criminal activity, giving police more reason to suspect that the fleeing suspect is planning or engaging in a crime. Suspicion also flows from daylight flight, however. Night's association with crime, and the difficulty of separating friend from foe in the darkness makes the night encounter potentially threatening to the person encountering the police. Therefore, an individual fleeing from an officer at night may think that he is fleeing from a potential aggressor rather than a police officer. This explanation does not hold during the day, as individuals can much better determine the identity and intent of approaching people. Daytime flight is also so unexpected it raises its own suspicions which a reasonable officer should investigate.

Nor does location fully explain flight. While, like darkness, the threat of crime reinforces the criminal intent associated with flight, flight from police in low-crime areas generate their own suspicions. As with darkness, people in high-crime areas may be more wary towards strangers. Unfortunately, some people in these areas may also be more fearful of police, such as recent immigrants from police states. Such innocent explanations are largely missing in lower-crime locations.[8] Activity that has both innocent and illicit possibilities supports a *Terry* stop. See Part I B 3, *supra*, at 14-16. Flight from police in safer locations is less likely to be innocent and is thus also suspicious.

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8. The existence of innocent reasons for flight in high-crime areas does not prevent reasonable suspicion from being formed. Ambiguous but suspicious behavior supports reasonable suspicion. See Part I B 3, *supra*, at 14-16.

If flight supports reasonable suspicion without regard to time or place, two of the more important variables in a *Terry* stop, see 4 LaFave, *supra*, §9.4(d), at 161-165 (discussing suspicious conduct regarding property and premises); *id.* §9.4(f), at 187-191, then flight from police will support a *Terry* stop under almost any conceivable circumstance. So long as the flight is unprovoked and from uniformed officers or a similarly known police presence, cf. *Wong Sun* v. *United States*, 371 U. S. 471, 482-483 (1963), *amicus* cannot conceive of a situation that would invalidate flight under *Terry*. Although courts must look to the factual context of the stop, see *Cortez*, *supra*, 449 U. S., at 417-418, flight from police is its own context. Drawing a bright line that allows flight alone to justify *Terry* stops will almost always yield the same result as would full analysis.

Holding that flight from a visible police presence will *per se* justify a *Terry* stop is thus the appropriate standard. Flight in this context creates a real suspicion of wrongdoing that warrants further investigation. See Part I B, *supra*. This level of suspicion is much more than enough to rise above the level of rumor or hunch, thus limiting opportunities for harassment. See *supra*, at 15-16. Since flight from police will justify a *Terry* stop in virtually any factual context, there is little to lose by making plain what will anyway become evident after painstaking case-by-case adjudication. Officers and the public will gain in the extra certainty and the freedom to investigate this inherently suspicious behavior. Recognizing that flight justifies a *Terry* stop would advance the primary goal of *Terry* —allowing police to do their jobs.

CONCLUSION

The decision of the Illinois Supreme Court should be reversed.

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Respectfully submitted,

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